NO. 9557

United States

Circuit Court of Appeals

For the Ninth Circuit

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Appellant,

vs.

ESTELLE CAMPBELL,

Appellee.

Upon Appeal from the United States District Court,
for the Western District of Washington,
Northern Division

Hon. Charles D. Cavanah,
District Judge

Brief of Appellant

Skeel, McKelvy, Henke,
Evenson & Uhlmann,
Attorneys for Appellant

914 Insurance Building,
Seattle, Washington.

LUMBERMENS, SEATTLE

INDEX OF CONTENTS

CASES CITED AND REFERENCES

REFERENCES

NO. 9557

United States

Circuit Court of Appeals

For the Ninth Circuit

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Appellant,

vs.

ESTELLE CAMPBELL,

Appellee.

Upon Appeal from the United States District Court,
for the Western District of Washington,
Northern Division

Hon. Charles D. Cavanah,
District Judge

BRIEF OF APPELLANT

STATEMENT OF PLEADINGS DISCLOSING JURISDICTION.

The appellee, Estelle Campbell, served and filed in the Superior Court of the State of Washington for King County her complaint in which she pleaded that she was a citizen of the State of Washsington,

residing at Seattle, and that the appellant, The Order of United Commercial Travelers of America, was a corporation incorporated in the State of Ohio. (R1)* She asked for a judgment against the appellant in the sum of $6,300.00. Pursuant to the provisions of 28 U. S. C. A. Sec. 41 and 71 the action was removed to the United States District Court for the Western District of Washington, Northern Division, on the grounds that it involved over $3,000.00 and that there was a diversity of citizenship.

On January 26, 1940, judgment was entered upon the verdict in favor of the appellee and thereafter on March 18, 1940, an order was entered denying the appellant's motion for judgment notwithstanding the verdict of the jury and motion for a new trial. (R26&31).

On April 16, 1940, notice of appeal was filed with the clerk's office, and on April 20, 1940, a supersedeas and cost bond on appeal was filed, thus perfecting the appellant's appeal to this Court. (R31&32).

STATEMENT OF THE CASE

The appellant is a fraternal benefit association, incorporated under the laws of Ohio, with its home office at Columbus, Ohio. The organization is governed by a body known as The Supreme Council.

*Reference to pages in Transcript of Record.

Throughout the country there are many local councils, one of which is located in Seattle, Washington, designated as Seattle Council No. 83. All local councils are subject to The Supreme Council and the rights, privileges and duties of the various councils and their members are determined by the constitution and by-laws, which are from time to time amended. The Order of United Commercial Travelers of America is a secret organization, in which there are two types of membership, one being for fraternal purposes only and the other including in addition insurance protection against accidents and accidental death. The second form of membership was held by Robert Henry Campbell, the deceased husband of the appellee. (R80 to 83)

The expenses of local councils are met and paid through the levying of dues, which are collected, retained and used by them. The insurance protection is paid for by means of assessments, the amounts of which are determined by the constitution and by-laws and which are levied by the Supreme Council. They are paid to the secretary of the local council, who acts as a collecting agent, and forwarded by him to the Supreme Council. The local council has nothing whatever to do with the insurance, settlement, or payment of any claims, or the determination of any policies with reference thereto.

On January 3, 1920, the appellant issued its Insurance Certificate No. 155,949 to Robert Henry Campbell. This certificate together with the Articles of Incorporation, Constitution and By-Laws, as they were and as they might later be amended, constituted the contract between the appellant and the deceased. (R41)

The Constitution and By-Laws effective on the date of death of Robert Campbell provided for an annual assessment in the amount of $16.00, payable annually, semi-annually or quarterly. In the case at bar, the assured paid his by quarterly installments, $4.00 being payable on or before December 31, March 31, June 30, and September 30 of each year. The dues to the local council amounting to one dollar each quarter, were required to be paid on the same dates, and no member was permitted to pay them separately from the assessments. (R83)

The contract provided that any member who failed to pay the dues and assessments on or before their due date automatically became delinquent, no longer in good standing, and by reason thereof lost all right to participate in the insurance benefits during the period of delinquency. The provison was self-executing and did not require any act by the appellant to be effective.

The member could regain his good standing by payment of the delinquent dues and assessments within thirty (30) days from the date of default, and thereafter be entitled to benefits provided for in the insurance contract.

Following the provision relative to "delinquency" is one pertaining to "suspension." By its terms it could become effective only after and following the thirty (30) day period of delinquency. The suspension provision authorized the local secretary to suspend a member from membership and insurance after 30 days' delinquency. The Constitution specifically provides that failure of the local secretary to suspend a delinquent member shall not constitute or be deemed a waiver of the forfeiture provision affecting those members who are delinquent. (R62)

It was the practice of the Supreme Council to send quarterly installment notices similar to Defendant's Exhibit B-1 about thirty (30) days before the installment was due. In the case at bar, a similar notice was forwarded to the assured on or about June 1, advising him that Installment No. 233 had to be paid before June 30, 1938, and that failure to do so would invalidate his insurance. (R56)

The Supreme Council published a national monthly magazine, known as "The Sample Case" which was mailed to each member. This magazine always car-

ried in it a notice showing what installment was last called and when it expired (see Defendant's Exhibit B-2). (R57)

The appellant also produced as exhibits three separate issues of a local monthly magazine published by the local council called "Seattle Tickler" (Exhibit B-3, -4, -5) (R58 & 59) and each issue carried notices or articles with reference to the assessment then due or about to become due.

In addition to the notice sent out by the Supreme Council, and those included in the national and local magazines, the local secretary following the date of default mailed each delinquent member a notice, reminding him of his delinquency and of the non-existence of coverage. Mr. Geo. B. Dunn, secretary and treasurer of the Seattle Council mailed such a notice to the assured on July 5, which was delivered to the assured's home on July 6. (R55)

Robert H. Campbell died from drowning on July 12, 1938, while on a vacation trip in Oregon. It is not disputed that at the time of his death quarterly assessments No. 233 was unpaid. This assessment was due and payable on or before June 30, 1938. (R77)

The appellee in her complaint alleges that Robert Henry Campbell was insured by the appellant; that all of the dues and assessments were paid or tendered;

that the policy was in full force and effect on July 12, 1938, the date upon which said Robert Henry Campbell came to his death. The appellee further alleged that she furnished the appellant notice of the accidental death of said Robert Henry Campbell and that appellant refused to make any payment under the policy. (R1)

The appellant admitted the existence of said policy and pleaded the portions of the certificate, the Constitution and By-Laws of the Order, referring to the subject of payment of dues and assessments, delinquency and suspension, and alleged the deceased was in default at the time of his death by reason of his having failed to pay Assessment No. 233, which was payable on June 30, 1938, and that by reason thereof the policy was not effective as of July 12, 1938. (R12)

The appellee replied by alleging, first, a credit in favor of the assured which matter is not now before this Court on this appeal; and, secondly, waiver of the provisions of the Constitution and By-Laws of the appellant Order. (R19)

Upon examination by the appellee over the objection of the appellant, Mr. Dunn testified that from the inception of the contract to the date of death, Mr. Campbell had been delinquent in his payments on several occasions. A total of 79 payments were made by the deceased, and of these 27 were delinquent. The

period of delinquency for 24 of the payments ranged from 7 to 54 days, one payment was 71 days late, one 76, and another 102 days late. (R73 to 77)

Mr. Dunn also testified that the deceased had never been suspended from membership. (R82)

The local secretary further testified that it was customary to mail a delinquent notice soon after default. In this particular instance he did, on July 5, 1938, place in the U. S. Mail an envelope containing such a notice, addressed to the deceased at his residence in Seattle. (Plaintiff's Exhibits 6 and 7) (R55) The notice stated the time for payment of assessment No. 233 expired June 30, 1938; that it must be paid at once as he could not receive any benefits in case of an accident, and that he was not a member in good standing as provided in the Constitution and By-Laws.

The appellee testified that her husband had left Seattle on July 2, 1938, and that when she returned to their home in Seattle following his death the above referred to notice was at the residence, unopened. (R79)

There was no evidence that any benefits under the certificate of insurance were ever demanded or paid to the deceased during the life of his membership.

The evidence as above stated was all the evidence produced by the appellee in support of her contention

that the appellant waived its contractual rights. There were admitted as plaintiff's exhibits the insurance certificate (Pl. Ex. No. 1), (R41), certificate of membership (Pl. Ex. No. 2) (R44) and a copy of the Constitution and By-Laws effective September 1, 1919 (Pl. Ex. No. 3). (R45)

With reference to procedure in collecting and remitting dues and assessments Mr. Dunn testified that he forwarded reports and remittances to the home office at Columbus, Ohio, on or before the 15th of each month. In that report he indicated those members who were delinquent and also those members who were suspended. (R82)

SPECIFICATIONS OF ERRORS

For its Specifications of Errors the appellant contends that:

I.

The Court erred in permitting the examination of George B. Dunn, local secretary, by appellee's counsel on the subject matter of when the deceased paid the various dues and assessments, and as to the question of whether the deceased had ever been suspended. Substantially, Mr. Dunn testified, over the appellant's objections, that the deceased had made a number of late payments, being 27 in number; that the deceased

had never been formally "suspended" within the meaning of the Constitution or By-Laws, even though some of the dues and assessments were more than 30 days delinquent. The following exception was taken to this line of testimony. (R72 to 77)

> "Mr. McKelvy: I want to interpose an objection at this time. Apparently, it is counsel's theory that because this man was late on other occasions, from time to time, that there was a waiver of some kind. In view of the provisions of the contract itself, I object to the question and this line of testimony on the ground that it is wholly immaterial, irrelevant and incompetent, as to the fact that he may have been late on other occasions." (R71)

II.

That the court erred in denying the appellant's motion for a dismissal and in refusing an instruction to the jury directing a verdict for the appellant as a matter of law. The following motion and grounds therefore, was made by the defendant:

> "Mr. McKelvy: Comes now the defendant, all parties having rested, and at this time challenges the legal sufficiency of the plaintiff's testimony to make out a case to go to the jury, and moves the court to dismiss the action and to instruct the jury to return a verdict in favor of the defendant as a matter of law, on the grounds and for the reasons that the plaintiff has failed to sustain the burden of showing that the policy in question, or the insurance certificate in question, was in good standing and in full force and effect at the time of the death of the decedent, for the

reason that the defendant has affirmatively shown that the policy was not paid up, that it was in default, and that the member was delinquent at the time of his death. The plaintiff has failed to sustain her allegation that there was a waiver on the part of the defendant, or that the defendant is estopped at this time from asserting the fact that the policy was not paid up at the time of the accident." (R84)

III.

That the court erred in instructing the jury, that

"I will say to you that you are instructed that there is but one issue of fact for you to determine in this case, from the evidence and under the instructions of the court, and that is: Did the defendant company waive its right to insist upon the forfeiture of the certificate of insurance by reason of the non-payment of the last assessment, and if you find that the defendant company did not waive such right, then your verdict will be for the defendant. On the other hand, should you find that it did waive such right, then your verdict will be for the plaintiff." (R94)

"I will say to you further that if you find from a fair preponderance of the evidence that Robert Henry Campbell habitually paid his assessments and dues due under the certificate of insurance at periods ranging from time to time later, and that the defendant company received them without putting into effect the penalty provisions set forth in its Constitution and By-Laws, and without forfeiting the certificate and requiring Robert Henry Campbell to formally apply for reinstatement; and if you further find that by such course of dealing Robert Henry Campbell, as a prudent person, was led to believe and did believe that he was making these payments in a manner satisfactory to the company, and that the custom and conduct of the company in receiving these pay-

ments, without insisting upon the penalties and forfeitures required by the Constitution and By-Laws, were calculated to lead an ordinarily prudent person to so understand and believe, and that he was thereby induced so to believe at all times prior to his death, and that at the time of his death he was induced to believe and did believe, that the certificate was in full force and effect, then the company is estopped and has waived its right to insist upon a forfeiture of the certificate by reason of the nonpayment of the last assessment, and in that case your verdict will be for the plaintiff." (R94)

To which the following exceptionswere taken:

"Mr. McKelvy: First, as to the instructions in which the court submitted the question to the jury as to whether or not the defendant pursued any course of conduct or action that could be construed as a waiver of the prompt payment of premiums, for the reason that there is no evidence in the record to justify the instruction. (R97)

"Second, the court's instruction relative to advising the jury that they might find that the defendant had waived its right to prompt payment, for the reason that if they found that it failed to enforce a penalty or to enforce the provisions of its Constitution and By-Laws, or of its contract, this is particularly an erroneous statement of law, for the reason that under the particular contract in question the defendant was bound to accept late payments by virtue of its contract and in the acceptance of these late payments it would be purely in performance of the provisions of its contract and could not under any theory be construed as a waiver.

"Furthermore, if there was any failure to invoke the suspension rule, as outlined by the contract, this would have nothing to do with any alleged waiver of the question of coverage while

the policy or the contract was in default. It would merely mean that the insured would have a right, or might have a right, to reinstatement at any time up until he was actually cancelled out by suspension." (R97)

IV.

The court erred in refusing to give the appellant's requested instruction No. 4 as follows:

> "You are instructed that, unless you find from the evidence that the defendant in this case pursued some course of conduct in acceptance of the deceased's premiums which was inconsistent with the various provisions of the insurance certificate and Constitution and By-Laws, then there can be no waiver or estoppel." (R99)

To which the following exception was taken:

> "Mr. McKelvy: I except further to the refusal to give requested instruction No. 4, in which the defendant requested the jury be instructed that unless it could find that the defendant pursued some course of conduct in the acceptance of the deceased's premiums which was inconsistent with the various provisions of the insurance certificate and the Constitution and By-Laws, there could be no waiver or estoppel. I think this is a clearly correct statement of the law. If the jury find only that what the defendant did was provided for as a right or obligation on the part of one or both of the parties to the contract, then obviously there could be no waiver or estoppel. Therefore, I think it rather prejudicial not to give that instruction." (R98)

V.

The court erred in refusing to give the appellant's

requested instruction No. 5, which reads as follows:

> "You are instructed that if you find that the defendant did only those things which it was entitled to do under the provisions of the insurance certificate and Constitution and By-Laws, then there can be no waiver or estoppel in the case." (R99)

The following exception was taken:

> "Mr. McKelvy: I except to the failure to give requested instruction No. 5, which again would have advised the jury that if the jury merely found that the defendant did only those things which it was entitled to do under its contract, or was bound to do by the provisions thereof, then there could be no waiver. It seems to me that there is the whole question here under the evidence. The jury might well find that the acceptance of all the premiums was done in compliance with the specific provisions of the contract, and if so, certainly there could be no waiver or estoppel. I therefore except on the ground that it is highly prejudicial to refuse the request." (R99)

VI.

That the court erred in denying the appellant's motion for judgment notwithstanding the verdict of the jury, or in the alternative, a motion for a new trial, which motions were as follows:

1. The defendant, The Order of United Commercial Travelers of America, moves the court herein to render and enter judgment in favor of the defendant herein, dismissing the above entitled action with predjudice, in accordance with this defendant's motion for a directed verdict, made at the time of the trial, notwithstanding the verdict of the jury herein. (R28)

2. Comes now the defendant The Order of United Commercial Travelers of America, and without waiving its challenge to the legal sufficiency of the evidence; without waiving its motion for a directed verdict made during the trial of the above entitled cause, and without waiving its motion for judgment notwithstanding the verdict but expressly relying thereon, this defendant herein does hereby move that it be granted a new trial in the above entitled cause for the following reasons materially affecting the substantial rights of this defendant:

1. Irregularity in the proceedings of the court and adverse party by which this defendant was prevented from having a fair trial;

2. Substantial errors and rulings on evidence at the trial;

3. Substantial errors in giving the court's instructions;

4. Substantial errors of the court in refusing to give certain of the defendant's requested instructions to the jury;

5. That the verdict of the jury was and is contrary to law;

6. That said verdict is contrary to the evidence in the case;

7. Misconduct of counsel, court and jury;

8. That the verdict appears to have been given under the influence of passion or prejudice;

9. Newly discovered evidence, surprise and newly discovered law;

10. Accident or surprise which ordinary prudence could not have guarded against;

11. Insufficiency of the evidence to justify the verdict, or that it is against the law;

12. Error in law occurring at the trial and excepted to at the time by the party making this application. (R29)

ARGUMENT

All specifications of error embody the same subject matter, and the appellant's argument as to one will apply with equal force to all the remaining specifications; therefore, they will all be discussed together.

This argument is based upon the proposition that every man has the right to enter into any contract that he so desires, if not contrary to public policy, and is bound by its terms. Appellant's contention is that on July 12, 1938, Robert Campbell was acting within the terms of the contract entered into between himself and the appellant and that he was exercising those rights which were his by the very terms of that contract. Appellant further contends that, in order to find that it waived any of the provisions of the con-

tract, as is contended by the appellee, there must be a voluntary relinquishment of a known right by the appellant. On July 12, 1938, this appellant had no affirmative right which it could by its own conduct voluntarily relinquish. It is the further contention of the appellant that the provisions relative to suspension were not, effective as of the date of death. The question of whether the appellant had, by its previous acts, waived its rights under these provisions has no bearing upon the decision in this case. By the terms of the contract between the deceased and the appellant, the local council and its officers were prevented from waiving any of the provisions relating to the matter of insurance.

As the action herein is one brought to enforce payment of a sum of money in accordance with an agreement or contract entered into between the appellant and the deceased, Robert Henry Campbell, whose beneficiary under that contract is the appellee, it is necessary that a careful study and examination be made of the provisions of the contract which by the terms of the certificate consist of an application, an insurance certificate, Articles of Incorporation and the Constitution and By-Laws of the Appellant Order, as amended from time to time. (Pl. Ex. 1) (R41) It was established that the Constitution and By-Laws effective September 1, 1937, were in full force and effect at the time of Mr. Campbell's death. (R60)

Referring to Page One of the insurance certificate, Article 2, Sec. 8 of the 1937 Constitution and By-Laws, and Article 7, Sec. 3 of the 1919 Constitution and By-Laws, there will be found provisions designated "Delinquency." (R44, 61, 47). In all three instances they provide that if any insured member fails to pay any of the fees, dues or assessments when they become due and payable, he shall "immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an insured member" and that every person claiming through his membership or his certificate of insurance at the time such default occurs or exists, shall be denied or suspended from any and all rights to indemnity or benefits. It further provides that "should such delinquent member at any time regain his good standing as an insured member in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him" to indemnity or benefits on account of any accident, injury or death occurring while not in good standing.

The contract of the appellant Order also stipulated that a delinquent member may restore himself to good standing within thirty days from the date of delinquency by payment of the delinquent dues and assessments. (Def. Ex. B-6 Art. II, Sec. 8). (R62) Considering these parts of the contract, which are clear and unequivocal, any member who fails to pay,

for instance, the assessment payable on or before June 30 becomes a delinquent member immediately thereafter and is in default. Any time up to July 30th, he may pay his delinquent dues and assessment and automatically again become a member in good standing. The penalty for being in default is that for any accident sustained or any accidental death occurring during the period of delinquency there can be no recovery of benefits under the policy or contract. These clauses are self-executing and are not dependent upon any affirmative action either by the appellant Order, or the insured member.

The 1937 Constitution and By-Laws go on to provide in Art. 2, Sec. 8, under the heading of "Suspensions" (R62) that any delinquent member who fails to restore himself to good standing within thirty days from the date of delinquency shall immediately be suspended by the Secretary-Treasurer of the local council from membership in the Order and he shall at once notify the Supreme Secretary of such suspension and report the same to the local council at its next regular meeting. As a part of that section we find that "failure to suspend a delinquent member under the provisions of this section shall not constitute nor be deemed a waiver of the forfeiture provided in this section." (R62) In other words, continuing with the above example, if by July 31st the assured had failed to pay his delinquent assessment, then it is the duty of

the local secretary to immediately suspend him and to so notify the Supreme Council.

It is very important in this case to note the difference betwen "delinquency" and "suspension." The two provisions do not apply simultaneously and the provision relative to "suspension" becomes effective only after the expiration of thirty days following the date the member is first in default, and then only after an affirmative act by the local secretary. The former provision is self-executing, while the latter is not.

Article II, Section 9 of the 1937 Constitution and By-Laws provides that anyone desiring to be reinstated within ninety days from the date of suspension may do so by signing a statement prepared by the Executive Committee and under certain circumstances furnish a satisfactory health certificate. Anyone desiring reinstatement after the ninety day period may do so by making application on a blank prepared by the Supreme Executive Committee, together with payment of a reinstatement fee, followed by an investigation by the Committee. (R63)

It is to be remembered that assessment No. 233 was due and payable on or before June 30, 1938, but in this case was never paid. Mr. Campbell died as the result of an accident on July 12, 1938.

1. *Parties may include any provision in a contract not contrary to public policy.*

It is a constitutional right of every man to enter into any contract he sees fit, so long as it is not contrary to law, nor contrary to public policy. Robert Henry Campbell, on the 3rd day of January, 1920, exercised that right, and became a party to the contract in question.

With reference to the "delinquency" and "suspension" provisions of the contract, there are no existing statutes forbidding or prohibiting them. Many courts have considered the question of whether such provisions are contrary to public policy. In all instances disclosed by our research these courts have held them to be proper, and in no way contrary to public policy.

In the case of *Conway v. Minn. Mutual Life Ins. Co.,* 62 Wash. 49, 112 Pac. 1106, one of the terms of the contract was that any person may be re-admitted as an insured in the discretion of the defendant officers, upon the furnishing of satisfactory evidence of good health, plus payment of all delinquent assessments. Therein the opinion reads:

> "The right of reinstatement depends upon the provisions of the contract. Since the right is not absolute the insurer may impose such conditions as it sees fit not contrary to public policy on which reinstatement may be had."

The provision of the contract in the Conway case is found in the Articles of Incorporation and provides

that any person may be re-admitted in the discretion of its officers and upon his furnishing satisfactory evidence of his good health plus payment of all delinquent assessments.

The Louisiana Court in *Richardson v. American National Insurance Company,* 137 So. 370, affirmed a judgment in favor of the defendants. In that case death of the assured occurred February 20, 1929, at 4:45 P. M. The premium was due and payable Februray 15th at 12 noon and by the terms of the policy there was an additional five-day grace period which would extend the time of payment to February 20th at 12 o'clock. The plaintiff pleaded estoppel based upon the fact that the defendant had accepted delinquent premiums as many as fifteen days after due date over a period of four years time. The premiums were paid tardily from three to fifteen days each month without protest. The terms of the policy were as follows:

> "If default be made in the payment of the agreed premiums for this policy the subsequent acceptance of a premium by the company or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injuries thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

The court in holding the clause should be given legal effect since the provisions in the policy constituted the

law between the parties thereto and the stipulation was not against public policy, said:

> "Finally plaintiff's attorneys say that since the policy provides for a ten-day suspension of liability after the arrear premiums are paid, that, as practically all the payments were very late, the insured was paying full protection and not getting it, and that where the payment was twenty days later, the insured was not covered that month at all, but was required to pay the full premium. Therefore, such clause in any policy would tend to cause the company to encourage delinquency and that such a contract is unconscionable and against public policy.
>
> "Whatever merit there may be in this contention, we feel that it is unnecessary for us to consider, for our Supreme Court and the several Supreme Courts rendered the decisions cited, *supra,* appear to have approved such a provision and therefore as this is not an original question we simply follow the authorities on the subject."

Also to the same effect are the cases of *Thomas v. First National Life Health & Accident Insurance Company,* 157 So. 409, La. 1934, and *Freedman v. Mutual Benefit Health & Accident Association,* 119 S. W. (2d) 1017 citing scores of additional authorities.

In *American National Insurance Company v. Otis,* 183 S. W. 183, a judgment for the plaintiff was reversed in favor of the defendant. The deceased was reinstated on January 4, 1915, and death occurred January 19, 1915. The policy provided that "In case death should occur from any cause whatever with-

in five weeks from the date of reinstatement, the company shall not be liable to any extent whatever on account of such death." The court in rendering its opinion referred to the Washington case of *Conway v. Minnesota Mutual Life Insurance Company,* 62 Wash. 49, 112 P. 1106, with approval and stated that such a provision is not contrary to public policy.

See also *Plumley v. Brotherhood of American Yeoman,* 229 N. W. 727, Iowa 1930.

2. *Terms of contract unambiguous.*

The terms of the contract between appellant and Robert Henry Campbell are unusually clear and free of any ambiguity. The language used is susceptible to only one interpretation. The United States Circuit Court of Appeals for the Tenth Circuit in 1931 in the case of *Order of United Commercial Travelers of America, Inc. v. Edwards,* 51 F. (2d) 187, considered the same constitution and by-laws as is involved in the case at bar. The court therein said at page 189:

> "It is well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense. (Citing cases.) There being no ambiguity in the language used there is no room for construction. * * * *"

In *Order of United Commercial Travelers v. Belue,* 263 Fed. 502, the Fourth Circuit Court adopted the above rule in construing the identical contract under consideration in the case at bar.

Again, in the case of *Freedman v. Mutual Benefit Health & Accident Association,* 119 S. W. (2d) 1017 (Mo. 1938), the court reverses a lower court judgment for the plaintiff. The policy provided that no benefits were to be paid until after ten days following reinstatement. The insured was reinstated October 16, and his illness commenced October 22. On October 28 the insured's wife notified the company of his illness, after which the company forwarded claim blanks requesting that they be completed. They did not at that time mention the ten-day provision, and the plaintiff contended that the company had waived it. The court stated that it was without authority to rewrite contracts.

To the same effect, see *Jones v. Travelers Protective Association of America,* 70 Fed. (2d) 74, in which it is stated that where there is no ambugity, insurance contracts of beneficial associations must be interpreted according to the ordinary meaning of simple words. The court therein refers to a great number of cases sustaining this general rule.

3. *Appellant had no Right to Waive, at Time of Campbell's Death."*

It is a well established rule of law that in order to constitute a waiver there must be an intentional relinquishment of a known right. Where no right exists it necessarily follows that there cannot be a waiver. In *Reynolds v. Travelers Insurance Company,* 176 Wash. 36, 78 Pac. (2d) 310, the Supreme Court of Washington said:

> "A waiver is a voluntary relinquishment of a known right and may be either expressed or implied. An express waiver is governed by its own terms and hence is not often the subject of much dispute. An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. An estoppel is a preclusion by act or conduct from asserting a right which might otherwise have existed to the detriment and prejudice of another who, in reliance on such act or conduct, has acted upon it. A waiver is unalateral and arises by the intentional relinquishment of a right, or by a neglect to insist upon it, while an estoppel presupposes some conduct or dealing with another by which the other is induced to act or forbear to act."

In *Shafer Bros. Land Co. v. Universal Picture Corp.,* 188 Wash. 33, 61 Pac. (2d) 598, the Washington Court in determining whether or not one party to a lease had waived certain of its provisions, said:

> "The remaining question is whether the performance of the covenant was waived * * * *. To constitute a waiver there must be an existing right and an intention to relinquish that right."

In *Eakle v. Hayes,* 185 Wash. 520, 55 Pac. (2d) 1072, the same court said:

> "A waiver is the voluntary or intentional relinquishment of a known right."

See also *Knutsen v. Truck Ins. Exchange,* 199 Wash. 1, 90 Pac. (2d) 282.

It is indeed difficult to see how it can logically be said that the appellant in the case at bar pursued such a course of conduct as to lead one to believe that there was a voluntary relinquishment of a known right. The question is, what right did the appellant have at the time Robert Campbell met his death which they could have waived? The contract *gives the member* the right to reinstate his contract by paying a premium which was in default. In thus reinstating his membership within the specified time of thirty days following the default, he avoided the necessity of making a new application for insurance and subjecting himself to all of the things incidental to a new application. *This right of reinstatement is a right which belongs to the member* and is not a provision of the contract which runs in favor of the appellant. Obviously, the insured member had a right to tender the quarterly premium to the appellant, even after his certificate was delinquent, and he had a right to force the appellant to accept that premium and reinstate him and place him in good standing at any time

within the time specified in the contract. Looking to the date upon which this member met his death, which was July 12, 1938, we find that he was then 12 days delinquent, as Assessment No. 233 had been called and was due on June 30.

On the date of his death and for 18 days thereafter, had he lived, this member would have had the right to tender his delinquent assessment to the local secretary and, without any further action, require the secretary to place him in good standing. It was the self-executing provision affecting delinquency, which was in effect on the day Robert Campbell met his death. By the very terms of the contract all effective provisions on that date were in favor of the insured member. The appellant had no right to make demands for the payment of that assessment, and it could not have cancelled the policy or suspended this member from membership as of the date of his death. The only right which the appellant had at that time was to deny any benefits for any injuries or accidental death occurring during the period of default.

The appellee claims that the appellant has waived its right to set up the forfeiture provisions, by reason of the fact that it had on many occasions received late payment of dues and assessments. She argues that because the appellant had failed to "suspend" the member, it had waived its rights under the delinquency

provisions. Whether or not the appellant waived its rights to suspend without notice at the expiration of thirty days following default has no bearing herein as the suspension provision could not have been effective on July 12, the date of death.

There are many cases, both state and federal, which have decided the very issues here involved, in all of which it has been held that a compliance with contractual provisions cannot possibly constitute a waiver. An almost parallel situation arises in the case of *Bunge v. Brotherhood of Maintenance of Way Employees,* 178 Wash. 33, 33 Pac. (2d) 383, decided by the Supreme Court of Washington sitting en banc on June 19, 1934. Because of its similarity to the case at bar we include a considerable portion of the opinion in this brief. An action was brought to recover on a death benefit certificate issued by the brotherhood upon the life of the plaintiff's deceased husband. We quote from the opinion:

> "According to the by-laws, there is but one class of dues and all dues are payable quarterly in advance, and if not paid within the month when they fall due, the member thus delinquent ceases to be in good standing and thus loses his right to a seat in the lodge and the privilege of interesting the grievances committee in his affairs. If the delinquency continues for six months the member is dropped from the rolls without notice and his membership thus automatically ended. By becoming delinquent, the member forfeits all

right to any death benefit *ipso facto* and there remains to him only the privilege, by paying the delinquent dues within six months and before he is dropped from the rolls, of reinstating himself in good standing in the Order." * * * *

A death benefit goes along with membership and increases in value in relation to the continuing of the membership.

"Thus it appears that a member pays dues to secure membership and the occupational, social and fraternal benefits that go with such membereship and are inseparable from it. The death benefit is a thing apart for which the member directly pays nothing, but it is in the nature of a reward for prompt payment of dues and long continued nondelinquent membership, or in other words, long continued membership in good standing." * * * *

"Delinquency had occurred from time to time during this membership, and always within the six months period Bunge paid the sums so delinquent and resumed his membership in good standing. These prior delinquencies are mentioned only because it is argued that they show a course of dealing long continued. That may be admitted, but if we are right as to their being no waiver on the occasion of the last delinquency, then there can have been no waiver on any prior occasion. So we omit definite mention of the delinquencies which precede the one which we now consider the vital delinquency.

"The dues payable July 1, 1931, amounting to the sum of four dollars, which were required to be paid before the end of that month in order to maintain Mr. Bunge's membership in good standing and his interest in the death benefit certificate, were not paid in July, nor at all, until the

17th day of August, 1931. Consequently, upon the first day of August, 1931, he was a delinquent member and had his death then occurred his beneficiary would have been entitled to no death benefit. By the payment of these delinquent dues on August 17, he automatically again became a member in good standing and from that date he began anew to earn an interest in the death benefit fund; but before one full year had elapsed, and on June 21, 1932, he died, hence the refusal on the part of the respondent to pay any death benefit.

"When once the several by-laws varying upon this question are considered, with sufficient care to understand the meaning of the whole, as well as each and every part, it becomes self evident that such an action as this, which confesses the default, but asserts that such default was waived, cannot succeed because there has been no waiver.

"To constitute a waiver there must be an existing right and an intention to relinquish that right. 27 R. C. L. 908.

"Here, on August 1, 1931, and on each day thereafter up to August 17, while the fatal delinquency existed, the respondent had no right to forfeit Mr. Bunge's membership in the order, because, though not in good standing, the by-laws gave him a six months period in which to cure his delinquency and regain his good standing. There was no call to give him notice that his then interest in the death benefit had been forfeited, because the contract, by which both were bound, made that forfeiture an inevitable and an irrevocable fact when the last day of July expired.

"Mr. Bunge had, under the by-laws, six months in which to save himself from final suspension and to reestablish himself so as to begin anew to earn a death benefit. His dues were four dollars per quarter, no more, no less. He must necessarily

pay four dollars to prevent final suspension and to remain a member of the order and enjoy its benefits other than the death benefit, and he was required to pay no more than that same four dollars to reenter the death benefit class and to begin again to build an interest in that fund. The respondent could not refuse to accept the four dollars paid on August 17, 1931; had, in fact, no shadow of right to refuse it, because, by doing so, it would wrongfully deny him the right to reinstatement, and therefore it relinquished nothing and waived nothing by so accepting the payment which it was obligated to accept.

"It appears that a similar case in which this respondent was a party was before the Supreme Court of Colorado, *Brotherhood of Maintenance of Way Employees v. Nolan,* 91 Colo. 181, 14 P. (2d.) 179. There, the respondent was held liable by a divided court. We, of course, know nothing of the contents of the record before the Colorado court. If the facts disclosed were only those mentioned in the majority opinion, then clearly, in that particular case, there was a waiver, but if the facts in that case were as found to be by the minority, and such as clearly appear in the record which is now before us, then there was and could be no waiver. We are bound by the record in this case. Certain language of the dissenting opinion in that case so clearly defines and elucidates the question here presented that we quote:

" 'It is clear that an insurer who, having the right to reject the payment as tendered too late, nevertheless accepts payment of an insurance premium, as such, after the time within which payment is required to be made, especially where the insurer has customarily accepted delinquent payments, waives the forfeiture that otherwise might have been enforced. * * * Under the brotherhood plan the brotherhood did not have

the right to reject the payments made by Thomas Kearins and other members after the due date; it accepted the payments, as under its rules it was required to do, as membership dues, not as payment for insurance * * * .

" 'It appears, therefore, that a member does not pay a stated amount for membership in the brotherhood and an additional amount for insurance, or death benefit, but that the amount of the membership dues is the same whether or not a death benefit is to be paid upon his decease. In other words, he pays dues for membership in a labor union and for all the privileges and advantages incident to membership in such a union; and if he remains a member for a certain prescribed period of time without any failure to pay his membership dues promptly on or before the due date, a death benefit will be paid to the person named by him. It is obvious that the provision for death benefits is intended merely as an inducement to, and a reward for long-continued, uninterrupted membership in the brotherhood and the prompt payment of membership dues. That Kearins failed to comply with the conditions necessary to entitle the plaintiff to a death benefit is admitted by her, but she pleads and relies upon a supposed waiver of such conditions. *There can be no waiver, however, where, as here, there is no freedom of choice to accept or to reject the tendered payment.* When Kearins, in November, paid his membership dues that were payable in October, the brotherhood was bound to accept the payment; it could not, if it would, have refused to accept it, or any part of it, for, though the delinquency affected the right to a death benefit in the manner explained above, Kearins still was a member of the brotherhood and as such was entitled and required to pay membership dues. The brotherhood could not drop his name from the membership roll or

refuse to accept his membership dues, unless and until his delinquency continued for six months.' "

The Minnesota court, 1900, in *Elder v. Grand Lodge A. O. U. W. of Minnesota,* 82 N. W. 987, reversed a judgment and held in favor of the defendant. The policy provided that a failure to pay any assessment when due operated to suspend the member without any act or declaration by the lodge. The member in that case died November 24, 1896, at which time the August 1st assessment had not been paid. On several previous occasions he was in default and was then reinstated. The policy also permitted reinstatement by payment of the past assessments and an affirmative vote. The court concluded:

"In other words a compliance with the terms of a contract cannot be turned or converted into a waiver of the terms of the contract complied with. * * * We are not unmindful of the fact that the law abhors forfeiture, and that the courts will perhaps enlarge and expand ordinary rules of application of evidence to defeat them. But cold facts cannot be ignored or a party relieved from the consequences of his neglect except upon some recognized principles of equity and justice."

In Cooley's Briefs on Insurance, 2nd edition, Volume 5, Page 4400, the writer states:

"Even if there has been such a general acceptance of overdue premiums that would under ordinary circumstances establish a custom, that result cannot be predicated when the acceptance was in accordance with and expressly limited by the provisions of the contract or the rules of the insurer. Thus, if past-due premiums are accepted

under the provisions of the contract or laws relating to the reinstatement of members who have forfeited their membership by default in the payment of assessments, this does not constitute a waiver of the forfeiture. (*Jenkins v. Anceint Order of United Workmen of Kansas,* 93 Kan. 324, 144 Pac. 223.) As was said in *Elder v. Grand Lodge A. O. U. W. of Minnesota,* 79 Minn. 468, 82 N. W. 987, a compliance with the terms of the contract cannot be converted into a waiver of the terms complied with.

"So, where a member of a fraternal benefit insurance association frequently became delinquent in paying monthly assessments, and each time with a single exception his default was relieved within the time and in the manner prescribed by the by-laws, such reinstatement as provided by contract did not operate to modify it, or to estop the association from asserting rights under self-executing provisions in the by-laws for forfeiture in event of delinquency, and the member having died while delinquent there can be no recovery on any ground of modification of contract or of estoppel. *Phillips v. Fraternal Reserve Association,* 171 Wis. 143, 176 N. W. 851."

Looking to the decision of *Jenkins v. Ancient Order of United Workmen of Kansas,* 144 Pac. 223, we find that the upper court directed a judgment for the defendant. It appears that the member had been in arrears a number of times but each time had been regularly reinstated in the Order upon payment of delinquent dues and assessments. He became delinquent for the June 1911 assessment and was reinstated as he had been before. He again became in arrears

for the July assessment and quarterly dues for August 2, 1911. Pursuant to a letter from the treasurer of the lodge advising him of his arrears and the fact that he was supended under the by-laws, the member mailed a check which was delayed in transmission and was received by the officer of the Order nineteen days after suspension and on the same day that the member died. The by-laws provided that failure of a member to pay assessments operated as a suspension and if he died during said period his beneficiaries received nothing. Another provision was that a member may be reinstated by paying the delinquent dues and assessments and upon an affirmative vote of a local lodge. In this case the lodge had always previously voted upon his reinstatement but at the time of his death no vote had yet been taken. The court said:

> "Something is made of the fact that he had been frequently suspended after he became a member and that so far as appeared he had always been reinstated by the lodge upon the payment of delinquent dues and assessments. The fact that reinstatement was never refused does not, of itself, amount to a waiver of the terms of the contract, since each reinstatement was accomplished by an affirmative vote of the lodge just as the by-laws of the order provided. * * * Nothing in the action taken would lead a reasonable man to believe that the requirements of the contract and by-laws relating to prompt payments of dues and assessment in the future had been waived."

In *Wiser v. Central Business Men's Assoc.*, 219 S. W. 102 (Mo. 1920), a judgment for the plaintiff was reversed in favor of the defendant. In this instance the assessment was due September 1st and was paid September 17th, while the assured's illness began September 5th. The provisions of the policy were:

> "If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the association or by any of its duly authorized agents shall reinstate the policy, but only to cover such sickness as may begin more than ten days after the date of such acceptance."

The court said:

> "The mere fact that the company was in the habit of accepting premiums after they were due is not of itself sufficient to show a waiver of the default, since it may have been that such acceptance of other defaulted premiums was in accordance with the above quoted provision. Hence, the mere fact of acceptance without more would not be sufficient to base a waiver upon. * * *."

> "However, the instructions of the plaintiff submitted the case to the jury on the theory that a general custom or practice of defendant to receive premiums after they were due, whereby policy holders, including the plaintiff, were led to believe that payments could be made after they were due, without any forfeiture being incurred, would be sufficient to constitute a waiver. As we have hereinabove said, the mere custom of receiving premiums after they were due would not of itself create such a waiver, since under such circumstances alone the acceptance of the belated premium could be referred to a compliance with

> the provision of the policy hereinabove quoted. Hence the instructions were erroneous."

New trial was ordered for other reasons.

The Iowa Supreme Court in 1897 decided the case of *Rice v. Grand Lodge of A. O. U. W. of Iowa,* 72 N. W. 770, wherein a verdict for the plaintiff was reversed in favor of the defendant. The policy provided for suspension on nonpayment of premium and also that "if all assessments shall be paid at any time within four months, the mere fact of payment shall operate to reinstate the person suspended. If not thus reinstated within four months, the reinstatement must be by such payment, a certificate of health and a vote of the local lodge." More than four months after the payment was due the assessment was forwarded but no health certificate was forwarded. The plaintiff alleges waiver. The opinion reads as follows:

> "Among the reasons urged in support of a waiver by the order is the manner in which Wright had been permitted to pay his assessments. It does appear that he had at times paid his assessments before due * * * . It also appears that he many times paid after the 28th of the month. That was his absolute right. The *lodge was bound to accept such payments and they had the effect of a reinstatement. To have denied them would have been violating the contract and the result would have been probably a reinstatement without payment.* There is absolutely nothing in such an act to show a purpose to permit or sanction an irregular course of dealing. To illustrate the argument, it is said that in

> 1890 Assessments 8 and 9 were paid three months after due 'and no question was raised so long as the defendant got the money.' What question could be raised? Notices were given of the assessments regularly, so far as known, and it was for Rice to pay or not, as he might elect. Whether paid before or after the 28th of the month, the lodge must accept it, within the four months and the law fixed his status. We are not told in argument what the lodge should have done in such case to avoid a waiver and it is difficult to anticipate any duty except to receive and give credit for the money."

To the same effect see *White v. Sovereign Camp, W. O. W.,* 192 S. E. 161 (S. C. 1937).

Another case which is very much in point is that of *Balogh v. Supreme Forest, Woodmen's Circle,* 280 N. W. 83 (Mich. 1938), in which the upper court affirmed a judgment *n. o. v.* for the defendant. In this case death occurred on July 20, 1935. The dues for the month of June were not paid until July 18th, at which time the deceased was in bad health. The policy provided that a "member if in good health may become reinstated by paying all arrearages and dues * * * within three months from the date of suspension." The provision pertaining to suspension for non-payment was self-executing. The assured stood automatically suspended from and after the date the premiums were in default by operation of the terms of the contract. In this particular case, the member was referred to as being suspended, while in the same

or a similar situation in the case at bar the member is considered as being delinquent. The court said in its opinon:

> "The practice of accepting payments after the first of the following month in no way affected the provision as to suspension. Under the express terms of the agreement, suspended members had an absolute right to reinstatement by paying the delinquency within three months from the date of suspension, provided the member was then in good health. It is therefore clear that acceptance of delinquencies in the following month was an act that the defendant was bound to perform under the very terms of the insurance contract. The member thereby became automatically reinstated, if then in good health. We fail to see how the performance of an act by the defendant's local officers, which they were expressly bound to do, could be a waiver of anything."

We refer to the case of *Stehlik v. Milwaukee Typographical Union No.* 23, 171 N. W. 753 (Wis. 1919). This was an action brought by a widow for the death of her husband, the action being based upon an insurance agreement between the deceased and the union. In the lower court, a judgment was rendered in favor of the plaintiff, but was reversed by the Supreme Court in favor of the defendant. As a part of the union organization, it was provided in the by-laws that upon the death of a member in good standing, the sum of $300 would be paid. A member was in good standing only when his monthly dues for the current month were paid. It was also provided by the general

laws of the order that members of subordinate unions shall stand suspended when four months in arrears for local or international dues or assessments. As a condition for reinstatement, all past dues and assessments had to be paid, together with a reinstatement fee. It appears from reading the opinion that,

> "Deceased was continually in arrears on his dues. He seldom, if ever, had them paid so as to be in good standing in the union. On one or two occasions he was more than four months in arrears and if the laws of the order had been strictly enforced by the secretary of the local union to whom he had paid his dues, he would have been automatically suspended. On such occasions, however, before it was necessary for the local secretary to make a report to the International Union, deceased paid sufficient dues to maintain his membership in the order and the local secretary did not report him as suspended. As a rule, however, the deceased was from two to three months in arrears on his dues. At the time of his death he was two months' in arrears."

The plaintiff contended that the defendant had waived the right to object to the payment of the $300 benefit fund for the reason that through its course of dealing it had permitted the deceased to pay his dues in the manner above indicated. In reference to that contention the court said:

> "If plaintiff's right to recover depended upon the question of whether the deceased was a member of the order, it might be necessary to consider whether the principal just quoted is applicable in view of the fact that the local sec-

> retary by his conduct on the few occasions waived those provisions of the constitution and by-laws of the order which automatically operated to suspend him as a member thereof. However, this membership in the order is not sufficient to entitle his legal representative to this benefit fund. It is plainly provided that said benefit fund shall be paid to the legal heirs of those who at the time of death were in good standing and we are referred to no conduct on the part of the defendant, or any of its officers, which in any way estopped it to deny that deceased was in good standing. The defendant and its officers were under obligation to accept the payment of his dues at the times they were tendered. The deceased had a right to be in arrears on his dues as he saw fit. In other words, he had a right to perpetuate his membership in the order by making payment of his dues in time to prevent his automatic suspension and the defendant could not refuse to accept the dues at such times."

To the same effect is *Sovereign Camp W. O. W. v. Hart,* 200 S. E. 296, (Ga. 1938.)

A very similar case to the one at bar and a case which has been referred to in Cooley's Briefs on Insurance is *Phillips v. Fraternal Reserve Association,* 176 N. W. 851. In that case the member of the fraternal order was given a period of sixty days within which to reinstate himself, the provisions being very similar to the one involved in the case at bar with the exception of time. It appears that the plaintiff had made late payments on many occasions, all of which were noted in the opinion but regardless of this fact

the court dismissed the case. We quote from that opinion as found on Page 853 as follows:

> "The difficulty with the position of the plaintiff is that with the single exception of assessment No. 142 each default was relieved within the time and in the manner prescribed by the by-laws. How can it be said that reinstatement in the manner prescribed by the contract operates to modify the contract or to estop the defendant from asserting its rights under the clauses of the contract. The forfeiture clause being a self-executing provision, the contract must be given in full effect; that is, the member is supended when the default occurs, and the policy is not in force until the member is reinstated in th manner prescribed by the by-laws. The insured died before reinstatement was attempted. At the time of his death, by reason of his default the policy was not in force, and the defendant, therefore, not liable. The insured was an able lawyer and had had a large experience in insurance matters and must have understood and appreciated the legal consequences of his acts. If he did not, although the result is harsh, we cannot rewrite his contract so as to create a liability where none existed.
>
> "If the insured had attempted to reinstate himself in the customary manner, a difficult situation would exist. There is nothing to indicate that the defendant or the insured ever regarded the contract as in force during the period between default and reinstatement. No action on the part of an officer of the local organization, or of the defendant company, was necessary under the terms of the policy to create a forfeiture. *Hence it was immaterial whether the insured was reported delinquent or not. If a default existed, the forfeiture occurred.*"

In the case at bar there is no evidence which indicates that the appellant and deceased ever regarded the contract as in force during the period of default and reinstatement. See also *Hope v. Travellers Protective Association of America,* 126 S. E. 45; (S. C. 1925).

In the case at bar the same question might very appropriately be asked, What question could be raised and what else could the appellant have required of the member? It was only at the end of the 30-day period following default that he could have been suspended, and 30 days *had not expired* at the time of his death. The company was bound to receive any dues which he might have tendered. It is clear, therefore, that the mere receipt in the past of the dues and assessments after the first day of the month upon which they should have been paid is not a waiver of any right of the organization, for the constitution gives that member the right to pay his dues at any time within the 30 days. The deceased member, and the appellant, entered into a mutual contract wherein it was stated the conditions under which the appellant would accept a renewal of the policy and the conditions were accepted by the deceased member. There is nothing that the order has done or said to lead the insured in this case to believe that he would be reinstated and his policy revived upon any other con-

ditions than those mentioned in the delinquency clause of the policy.

4. *Payent Presumed to be In Accordance With Contractual Provisions.*

It is the contention of the appellant that where dues and assessments are paid and accepted, and there is a provision in the contract authorizing that acceptance, it must be presumed that they were paid and accepted in accordance with the provisions. There are many cases decided to this effect, and sustains the appellant's contention. The Louisiana court in 1922, in deciding the case of *Taylor v. Latin-American Life and Cas. Ins. Co.* 94 So. 375, held in favor of the defendant. Therein the policy provided that it might be revived after delinquency by the payment of all arrears, but only to cover diseases or injuries occurring after twenty-eight days following the time of revival. The insured paid a premium on February 28th, which was due February 21st. The insured died within the specified twenty-eight days following the time of revival. Plaintiff claims an estoppel because on other occasions the company had accepted late dues. The court in deciding the case said:

> "We think, however, that the payments must be deemed to have been made and accepted under those provisions of the policy relating to reinstatement. By accepting them the defendant did not give the insured to understand that the twenty-eight day period was waived. In the absence of

> anything to the contrary the insured was justified only in believing that the payments were accepted under the terms of the policy which fixed the effect of receiving them."

In the case at bar there was no evidence to show the insured was justified in believing that the premiums were accepted under any other than the terms of the contract.

On this same subject the Missouri court has held:

> "The mere fact that the company was in the habit of accepting premiums after they were due is not of itself sufficient to show a waiver of the default, since it may have been that such acceptance of other defaulted premiums was in accordance with the above quoted provision. Hence the mere fact of acceptance, without more, would not be sufficient to base a waiver upon." *Wiser v. Central Business Men's Ass'n.* 219 S .W. 102.

5. *Failure to "Suspend" Did Not Waive the Forfeiture by Reason of Delinquency.*

The appellee will contend that the appellant waived its right to the forfeiture provisions of the contract because the local secretary, Mr. Dunn, had failed to "suspend" the deceased, on those occasions when his dues and assessments were more than 30 days delinquent, as provided in Article II, Section 8 of the 1937 Constitution and By-Laws (Def. Ex. B-6). In fact most of her argument made in this case has been devoted to that subject. Such an argument loses sight of the actual provisions of the contract. To interpret the provisions regarding "suspension" the whole of it

must be read and considered. After stating that a member shall be suspended should he "fail to restore himself to good standing within 30 days from the date of such delinquency" by the local secretary, but that *"failure to suspend"* a delinquent member under the provisions of this Section shall not constitute nor be deemed a waiver of the forfeiture provided for * * * ."

In addition to the above provision, the 1937 Constitution and By-Laws in Article IV, Section 13, (Def. Ex. B-6) also provides that "No Grand or Local Council, officer, member or agent of any Local, Grand, or Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be thereafter enacted."

The failure to suspend cannot constitute a waiver of the Appellant's rights of forfeiture because, first, the *contract specifically provides it shall not do so,* and secondly, the provision regarding suspension could not possibly have been effective on the date of the assured's death regardless of whether it had or had not been previously waived. *In point of time, the provision could not become effective until August* 1, 1938, *some* 18 *days after Campbell's death.*

We refer the court to two cases in which the appellant in the case at bar was one of the parties in each of those actions. Each of them discuss the very issue before the court in this appeal, and in both cases the same contract is being considered. We refer first to *Order of United Commercial Travelers of America v. Belue,* 263 F. 502, (4th Circuit).

The writer of the opinion clearly described the formation of the governing body and local council and refers to the rights, privileges and duties of the members and the various councils. In April 1912 Belue joined the local council, became an insured member and received his certificate. A new certificate was issued to him in 1914 for reasons not material. He died April 24, 1917 from an accidental wound. The company denied liability on the ground that at the time the assured received the injury he was not in good standing. The facts are that for a year or more after he received the insurance certificate he paid his dues with reasonable promptness. In 1916, however, he was supended for failure to pay insurance dues and assessment and was later reinstated when he paid the amounts for which he was then in arrears. He was reinstated on August 12, 1916. No payment was made by him after that date. On April 19, 1917 he sustained an injury which resulted in his death a few days later. The secretary had sent him several

statements regarding his delinquent dues and assessment and, on April 20, the secretary again wrote him after which time Belue's father took a check to the office of the Order, which check was accepted and deposited in the bank without knowledge on the part of the secretary that Belue had received an injury. The opinion of the court reads as follows:

> "The case comes at once to a question of a waiver. Plaintiff contends that the acceptance of the father's check by Reid, the local secretary, though in ignorance of Belue's illness, or of any claim that he had suffered an accident, operated nevertheless to restore the insured to 'good standing' in all respects and to give him the status of a member who had not been delinquent. We are unable to sustain this contention. The certificate issued to Belue, reproducing a provision of the constitution authorized by the laws of Ohio and of South Carolina, contains the unqualified statement that, "no officer, member or agent of any Subordinate, Grand or the Supreme Council of this Order is authorized or permitted to waive any of the provisions of the constitution of this Order relating to insurance as the same are now in force or may be hereafter enacted.' And the constitution provides in most explicit terms, repeated in the certificate, that if any insured member fails to pay his dues and assessments as and when they become payable, 'he shall immediately, on the happening of such default and by virtue thereof' cease to be in good standing and be suspended from all benefits and rights to indemnity, and that if such delinquent should at any time regain his good standing as an insured member 'his restoration thereto shall in nowise operate to entitle him or any one claiming by, through or under him, or his membership or his

certificate of insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.'

"The facts established at the trial permit no doubt of the full application of these provisions. It is virtually conceded and surely cannot be denied that the cause of Belue's illness and death, whatever it was, antedated by some days at least the payment made by his father. When that payment was unwittingly accepted, Belue had been in default for several months and by virtue thereof had forfeited all rights to indemnity under the insurance contract. True, he had not been formally 'suspended,' apparently because the local council had neglected its duty and so, for argument sake, it may be assumed that Reid's acceptance of the check on the 21st of April operated to reinstate Belue in good standing as an insured member from and after that date. By no valid process of reasoning can the transaction be given any greater effect. That it was not and could not be retroactive to the extent of creating liability for an accident which happened during the period of delinquency, seems too plain for serious question."

"The whole argument of plaintiff is conclusively answered, as we think, by the fact that Belue was not insured at the time that he is alleged to have received an injury, because he was then in arrears of long standing, and that no after payment to the local secretary or even to the Supreme Council itself could revive his insurance as against an accident occurring in the meantime. Not only does the contract expressly so declare, but it also declares in clearest terms that no officer or agent of the Order shall have authority or be permitted to waive its provisions. In our judgment the local secretary, whether acting in that capacity or merely as a collecting

agent for the Supreme Council was wholly without power by anything he did or could do to relieve Belue from the consequences of his default or to estop the defendant from denying liability because of that default. To hold otherwise would be to set at naught the basic provisions of the constitution and to imperil the stability and usefulness of the Order by making it responsible in such circumstances as are here disclosed for the mistakes and negligence and even the bad faith of local officials. The claim of waiver must be rejected."

"This conclusion appears to be supported by practically unanimous authority. Indeed the decisions are so little in conflict that quotations would hardly be appropriate. (Citing cases)."

Another case clearly in point, decided by the South Carolina court in 1917, is *Sternheimer v. Order of the United Commercial Travelers of America,* 93 S. E. 8. Judgment was entered in the lower court in favor of the defendant upon its motion for a directed verdict. The supreme court affirmed the order. The opinion reads as follows:

"On January 22, 1910, Hiram C. Sternheimer became a member of the defendant fraternal benefit association and a certificate of membership was issued to him. * * * Insured was accidentally killed September 12, 1912. Defendant refused payment on the ground that he was not in good standing at the time of his death. The Constitution and By-Laws of the Order provide that any member who fails to pay his dues and assessments 'when and as the same become due and payable' shall immediately become a delinquent member and the right to indemnity and benefits is thereby forfeited during his delinquency; upon

payment of arrearages he is *ipso facto* restored to good standing but only for indemnity and benefits thereafter accruing; that delinquent members shall be suspended at the next regular meeting of the subordinate Council to which they belong, and, in default of such meeting by the Secretary-Treasurer thereof, and notice thereof shall be given to the Supreme Secretary; but neither the failure to suspend a delinquent member nor the giving of notice of dues and assessments to delinquent or suspended members shall be a waiver of the forfeiture incurred. The difference between delinquency and suspension is that a delinquent member may restore himself to good standing simply by paying his arrearages but a suspended member is required to file a new application, and pay all arrearages and certain fines, and be restored, if at all, by vote of the Council in which three adverse ballots are sufficient to reject the application. The first question is one of practice. Plaintiff alleged, *inter alia,* that insured was in good standing at the time of his death. Defendant's answer did not deny any allegations of the complaint but set up delinquencies of the insured at the time of his death, as an affirmative defense, alleging that he was in arrears for dues and assessments at the time of his death. * * *

"After hearing all the evidence offered by both parties the court directed a verdict for defendant. To this plaintiff excepts on the ground that the evidence warranted a reasonable finding, first, that insured was not delinquent at the time of his death; and second, of waiver.

"* * * The dues were $5.00 a year due and payable $2.50 January 1st and $2.50 July 1st. The amount of dues and dates of payment thereof were fixed by a by-law but it was the custom of the Council to allow an extension of thirty days for the payment of dues as they belonged

> exclusively to the local Council. *It was also the custom of the Council to allow delinquent members to pass the time when they should have been suspended without suspending them; but of this custom neither the Supreme Council nor any of its officers had any notice."*

It appeared from the evidence that at the time of the death of Sternheimer he had not paid the dues payable July 1, 1912, nor had he paid assessments No. 111 and 112 which were payable on or before June 15th and August 14th, 1912, and at the time of his death the total arrearages were $6.50 which was made up of $2.50 for dues payable July 1st and $4.00 for those two assessments which were due June 15th and August 14th. The evidence further showed that on August 18th the deceased sent a letter to the local secretary inquiring as to how much he owed. That letter was answered on August 24th according to the secretary's records in which he advised that there was $6.50 for dues and assessments. On August 26th a circular was sent to Sternheimer in which his attention was again called to the fact that he was delinquent $6.50. After the assured's death there was found in his personal papers the circular letter of August 26th and the assessment card for Assessments 111 and 112. The testimony of the plaintiff was that she did not find among the letters of the deceased that one dated August 24th written by the secretary.

In deciding the case, the court said:

"The burden of proving waiver was on plaintiff. *Copeland v. Insurance Co.,* 43 South Carolina 26, 20 S. E. 754. The facts relied upon as evidence of waiver have already been stated, to-wit, custom of the local Council and its officers of allowing members to pass the period of suspension without payment of dues and assessments without suspending them and notifying the Supreme Secretary thereof. There are two reasons why this cannot be held to show waiver:

"(1) *The Constitution and By-Laws of the Order expressly provide that it shall not constitute waiver. That was a part of the contract agreed to by the insured and binding upon him and his beneficiary.* * * *

"(2) *There was no evidence tending to show that the Supreme Council or any of its officers had notice of the custom.* * * * In this case the Secretary-Treasurer refused to accept them. Clearly, therefore, there was in this case no waiver by the conduct of the Secretary-Treasurer in accepting payment of arrearages to hold that the failure of that officer or of the local Council to suspend delinuent members was a waiver would be to abrogate the Constitution and By-Laws of the Order and the statutes of this state."

The contract in the case at bar not only stipulated that the failure of the local secretary to suspend a member would not be deemed a waiver of the forfeiture provisions, but in addition it specifically provided, as previously stated, the local council or any of its officers shall not have the power to waive any provisions relating to insurance. In view of these two provisions it is not possible for the appellee to establish waiver and estoppel by proving some action or failure of action

by the local council or its officers as required by the constitution and By-Laws.

Both the Supreme Court of the United States, and the circuit court of appeals for the eighth circuit have held fraternal organizations may limit the power or ability of the local councils or its officers to waive any provisions of its contracts, and that the parties to such a contract are presumed to know its terms and are bound thereby.

The opinion of the Supreme Court in the case of *Northern Assurance Co. v. Grand View Bldg. Assn.*, 182 U. S. 308, 22 Sup. Ct. 123, 46 L. Ed. 313, is as follows:

> ". . . policy holders of insurance companies must, at their peril, take notice of limitations upon the powers of local soliciting agents, of which they are advised by provisions contained in their policies, . . ."

The other case above referred to is that of *Modern Woodmen of America v. Tevis*, 117 Fed. 369 wherein Judge Sanborn said:

> "A principal may limit the authority of his agent and when he does so the agent cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitation of his power. Insurance companies and beneficial associations may limit the authority of their agents in this way by stipulations in their contracts, and, when so limited, such agents cannot by contract, waiver, or

> estoppel bind their companies to the insured or to the beneficiaries of the agreements beyond the scope of their authority prescribed therein, because the insured and the beneficiaries are conclusively presumed, in the absence of fraud or mistake, to know the terms of their contracts. The Modern Woodmen of America so limited the power of the clerk of the local camp by the terms of its benefit certificate in this case that he was without authority to extend the time of payment of benefit assessments, to waive defaults in their payment, or to reinstate a delinquent member who was not in good health, or who failed to furnish a warranty thereof. The beneficiaries and the insured knew these limitations upon the power of this agent, because they were a part of their contract with the society; and the acts of this local clerk beyond the scope of his prescribed authority, in the absence of notice or knowledge of and acquiescence in them by some of the principal officers of the society, constituted no waiver, estoppel, or contract of the association. They were not the acts of the society, and the insured and the beneficiaries were charged with knowledge of that fact . . . ."

In the Tevis case the question was whether the member was in good standing when he died. A local lodge custom of collecting assessments late were the facts depended on to establish waiver and estoppel. The local lodge had set up a safety fund, from which the clerk was authorized to draw to pay one assessment for delinquent members. The report of the local clerk was required to be sent the head lodge on the 20th of the month following the due date. Instead of suspending members who were delinquent on the

first of the month and reinstating those who had paid before the 20th, a custom grew up to accept dues and assessments any time before the report was sent to the head lodge. The June assessment had not been paid, but this was paid for him out of the safety fund. He was not reported as being either delinquent or suspended. The July assessment was delinquent *ipso facto* August 1st. Before the report was sent to the head lodge, and on August 10th, the member died. The beneficiary contended that on account of the safety fund of the local lodge that the insured died in good standing, and that the society was estopped from forfeiting the certificate.

6. *The Burden is Upon the Plaintiff to Establish Waiver.*

It was said in the case of *Fink v. Catholic Order of Foresters,* 200 N. W., 809, (Minn., 1924) as follows:

> "To show a waiver the burden is upon those asserting it. *Bratley v. Brotherhood of American Yeomen,* 198 N. W. 128; *Louden v. Modern Brotherhood of America,* 107 Minn. 12, 119 N. W., 425, and *Elder v. Grand Lodge A. O. U. W.,* 79 Minn. 468, 82 N. W., 987."

CONCLUSION

The trial court submitted this case to the jury on the sole question of waiver and estoppel. The court allowed the jury to say that the appellant waived some right by reason of its contract in accepting

premiums from the deceased after they had become delinquent. The court allowed the jury to further say that, by reason of such an act, the appellant was estopped from denying liability upon the certificate. Diligent search of the record reveals no evidence upon which a finding could be made that the appellant did anything, or pursued any course of conduct, inconsistent with the provisions of the contract here in question. We repeat, that the deceased had the right to pay his premiums after they had become delinquent and the appellant was bound to accept such premiums.

The provisions of the contract giving the insured the right to tender late payment of premiums did not limit the number of times that this right might be exercised by him. He might be late in every payment made and the appellant would be bound to accept his late payments. Obviously, the doctrine of waiver and estoppel cannot be applied where the parties were merely fulfilling their obligations under a contract, or exercising the rights which they had by virtue of said contract.

The question of suspension of the insured in this case cannot possibly be material to this inquiry. At the time of his death the insured had been a delinquent member for twelve days and the right to invoke the suspension provision would not arise until the expiration of another eighteen days following his death.

We submit, therefore, that the judgment of the trial court should be reversed, with instructions to dismiss the action.

Respectfully submitted:

SKEEL, MCKELVY, HENKE,
EVENSON & UHLMANN